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No. 80-1735

In The

Supreme Court of the United States

October Term, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE, PETITIONERS

v.

HOWARD S. ABRAMSON, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the government may convert information originally acquired for law enforcement purposes into new documents for clearly non-law enforcement purposes and still have such information exempted from disclosure pursuant to Exemption 7 of the Freedom of Information Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION 4

CONCLUSION 7

TABLE OF AUTHORITIES

Statute:

Freedom of Information Act, 5 U.S.C. 552 2
5 U.S.C. 552 (b)(1) 2
5 U.S.C. 552 (b)(6) 5, 6
5 U.S.C. 552 (b)(7) 3, 4, 5, 6, 7
5 U.S.C. 552 (b)(7)(C) 2
5 U.S.C. 552 (b)(7)(D) 2

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STATEMENT

This action arose when Howard S. Abramson, the Respondent, as a professional journalist, learned of an instance in which information regarding a politician in Connecticut, then a candidate for the U.S. Senate, had been provided to the White House by the FBI. The partially obscured copy (which he had obtained from a non-governmental source) of the FBI cover memorandum transmitting the information did not indicate any purpose, but merely referred to an antecedent White House request.

The Respondent questioned what legal justification could enable the White House to be able to direct the FBI to investigate and turn over its "secret" information about the individual in question. (The FBI's memorandum carried a "secret" classification.) Further, the individual's political leanings made it obvious that he could not possibly have been considered for any political appointment in that administration.

In an effort to ascertain what legal authorization and mechanism the White House used to obtain the information, what information was actually conveyed to the White House, and what uses the White House made of the information, Respondent, in June, 1976, filed a request under the Freedom of Information Act, 5 U.S.C. 552 (hereinafter "FOIA" or "Act").

Petitioners had categorically and continually denied any and all liability under the FOIA, both during the administrative appeal procedures and in its answer to Respondent's suit.

Petitioners forced Respondent to exhaust his administrative remedies, hire legal counsel, file his suit in this matter, and actually walk into the courtroom before they were willing to even focus on Respondent's request and admit the existence of a colorable claim under the Act.

Petitioners then granted Respondent access to a substantial number of documents. Petitioners, however, expurgated parts of the documents, claiming they were exempted pursuant to Sections b(7)(C) and (D) and b(1). (The material expurgated pursuant to Exemptions b(1) and b(7)(D) is no longer at issue.)

The document at issue (referred to as document 3) contains information requested and transmitted to the White

House concerning eleven prominent individuals who had vocalized political views contrary to those of the President.[1]

It appears that the White House ripped a full page protest ad in the New York Times that the eleven individuals had signed, and forwarded that ad to the FBI with the request that it investigate these individuals and transmit its findings to the White House. The document at issue is comprised of the information compiled by the FBI in compliance with that White House request.

Both the lower courts have found that the document in question was compiled for partisan political – and not law enforcement – purposes and is thus not exempt from disclosure under the Act.

Petitioners argued that even though the document in question was not compiled for law enforcement purposes, the information contained in the document had originally been obtained for law enforcement purposes, and thus met the threshold requirement of Exemption b(7). The FBI thus argued that it must be able to transmit highly confidential information (including names of informants[2] and information which would constitute an unwarranted invasion of personal privacy) from its own law enforcement files for non-law enforcement purposes, without regard to the legal requirements of the FOIA.

But the Court of Appeals for the District of Columbia held:

> "However, the statutory scheme of the FOIA very clearly indicates that exemptions from

[1]Petitioners' Appendix at page 10A.

[2]Respondent has continually reasserted that he does not want the names of informants.

> disclosure apply only to documents, and not to the use of the information contained in such documents. Thus when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA."[3]

The Court then reaffirmed that the government had failed to qualify for Exemption 7 and required that the document be disclosed.

> ". . . the Government has failed to demonstrate that the "name check" summaries were compiled for law enforcement purposes, and [we] accordingly find that the recompiled summary documents have been improperly withheld."[4]

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly interpreted and applied Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7).

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[3]Petitioner's Appendix at 15A.

[4]Ibid at 18A.

The Court of Appeals also held that if the attachments were photocopies of original FBI documents which had been compiled for law enforcement purposes, such documents could be exempt from disclosure.

That holding is dictum, as all the attachments have been released. Although Petitioners fail to disclose that fact, their own description of the Attachments makes it clear that they are public documents and could not be in dispute. On page 5 of their petition they describe the attachments as:

". . . a copy of an article written by one of the individuals, a Vietnam Moratorium Committee flyer, and a typed list of the individuals whose names appear on the flyer."

The statutory structure of the Act is clear. Congress determined that information should be withheld from the public only under certain limited conditions. The public has a right to know what kind of information the government is compiling for purposes other than those specifically exempted. And only through such disclosure can the citizenry determine whether they approve of such uses.

The petitioners are arguing that the exempted uses of information should be expanded to any use of their choosing, and without public scrutiny, as long as the information being disseminated was originally compiled for any law enforcement purposes. And while we also question the specific non-law enforcement purposes for which petitioners argue the confidential right to disseminate such information,[5] the act is clear that such argument must be made before Congress, and not the courts.

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[5]In addition to the uses Petitioners note on page 16 of their petition for which they must be able to use such highly confidential information (some of which may arguably be law enforcement purposes), they also argued in "Appellees Petition for Rehearing and Suggestion for Rehearing En Banc" at page 12, that the FBI must be able to use such information for various management or administrative purposes such as audits, budget considerations, or Congressional oversight and review.

We are outraged at petitioner's dissemination of informants' names and highly confidential personal information for these purposes.

Information used for the purposes claimed necessary by Petitioners may, in fact, be exempt under Exemption 6 in any event. Petitioners' purposes could be adequately satisfied with summaries either omitting any personal identifiers, or only categorizing the specific information. And, of course, removing the personal identifiers would moot petitioners' need to raise Exemptions 6 or 7 with respect to such documents. Further, such documents may be exempt from disclosure under other provisions of the Act or other statutes of Congress.

The structure of the Act demonstrates Congress' concern about the balance between the public's right to know the information used by the government and the individual's right to privacy. Congress determined that such balancing would have to be done on a case-by-case basis and, pursuant to Exemptions 6* and 7, authorized the courts to make such a balance. Although it appears that Exemption 6 would cover all cases where an individual's privacy was in question, its balancing test requires the government not only to demonstrate that the disclosure of the information would constitute an unwarranted invasion of personal privacy, as required by Exemption 7, but also that such invasion was "clearly" unwarranted.

However, Congress did not even authorize the courts to weigh the individual's rights against the public's in every instance. Congress determined that the public's right to know in cases where the information did not meet the threshold requirements of the exemptions, was – as in this case before the Bench – automatically greater than the individual's rights to privacy. (The threshold requirement of Exemption 7 is that the record in question must have been compiled for law enforcement purposes.)

The Court of Appeals correctly applied the language of the Act and found that since the document in question had not been compiled for law enforcement purposes, it could not be exempt from disclosure under Exemption 7.

If, however, the Court determines to grant certiorari in this case, the question presented should be:

Whether the government may convert information originally acquired for law enforcement purposes into

*Petitioners did not raise Exemption 6 in this case.

new documents for clearly non-law enforcement purposes and still have such information exempted from disclosure pursuant to Exemption 7 of the Freedom of Information Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 1981